60

MOTION FILED
JUN 2 - 2007

(4)

No. 06-1593

In the Supreme Court of the United States

RICHARD M. COWETT, M.D.
Petitioner,

v.

TCH PEDIATRICS, INC., et al.,
Respondents.

On Petition for a Writ of Certiorari to the State of Ohio, Mahoning County Court of Appeals, Seventh District

MOTION TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI AND BRIEF OF *AMICUS CURIAE* THE SEMMELWEIS SOCIETY INTERNATIONAL IN SUPPORT OF PETITIONER

TOM CURTIS*
Counsel of Record
ABBIE P. MALINIAK
CURTIS GREEN & FURMAN LLP
140 SOUTH LAKE AVENUE, SUITE 208
PASADENA, CA 91101
(626) 585-9800
* *Counsel of Record for Amicus Curiae*

July 2, 2007

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court, the Semmelweis Society International respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the Petition for Writ of Certiorari submitted by Petitioner, Richard M. Cowett, M.D. Respondent has not granted consent, thereby making this motion necessary.

The Semmelweis Society International consists of a group of concerned physicians and other professionals whose primary mission it is to improve the quality of healthcare in the United States by advocating for fair peer review among medical doctors. One of the Society's objectives is to promote awareness that the system by which physicians are reviewed for the competency of their medical judgment and skill is often driven by economics and has little or nothing to do with the quality of care.

Since the Healthcare Quality Improvement Act ("HCQIA") was enacted almost 21 years ago, its purpose has been thwarted through misinterpretation by federal and state courts, allowing manipulation of the peer review process by economic and political competitors without regard as to motive. The physicians affected by this sham peer review have been reported to the National Practitioner Data Bank and have lost valuable vested property interests. Patients have lost access to physicians of their choice as well. This practice continues to go on unchecked.

This Petition has national implications for the integrity of professional peer review and the delivery of quality medical

care to the public. When physicians are caught in a deceitful peer review process brought on by an economic competitor, their careers are ruined, having a catastrophic effect on both them and the patients they treat. Physicians that might otherwise speak out in favor of unfair practices at hospitals fail to do so for fear of a sham peer review.

The Semmelweis Society submits the attached brief to explain the importance of the relevance of an examination of motive to an evaluation of the reasonable belief element of HCQIA immunity.

For the above reasons, the Semmelweis Society respectfully requests that this Motion for Leave to File the Attached Brief, *amicus curiae* be granted.

Respectfully submitted,

TOM CURTIS
ABBIE P. MALINIAK
CURTIS GREEN & FURMAN LLP
140 SOUTH LAKE AVENUE
SUITE 208
PASADENA, CA 91101
(626) 585-9800

Counsel for The Semmelweis Society International

QUESTION PRESENTED

The Health Care Quality Improvement Act of 1986 grants limited immunity to professional review bodies, such as hospitals, for professional review actions that satisfy the Acts's reasonableness and due process standards. Specifically, the Act limits immunity to peer review actions, "taken in the **reasonable belief** that the action was in the furtherance of quality healthcare." 42 U.S.C., section 11112(a)1. (emphasis added)

The question presented is:

> Is evidence of motive relevant to an evaluation of the "reasonable belief" element of HCQIA immunity?

TABLE OF CONTENTS

Pages

MOTION FOR LEAVE TO FILE i

QUESTION PRESENTED iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. It Is Essential That HCQIA Be Interpreted In a Manner That Fairly Effectuates Congressional Intent While Protecting The Physicians Directly Affected Thereby 6

II. As Interpreted By the Courts, the Health Care Quality Improvement Act Protects Peer Review Committee Members That Use The Peer Review Process to Rid Themselves Of Economic Competitors 10

III. The Existence of the National Practitioner Data Bank and HCQIA's Mandatory Reporting Requirement Has Real and Devastating Effects On A Physician's Livelihood 16

CONCLUSION 18

TABLE OF AUTHORITIES

Cases **Pages**

Austin v. McNamara,
979 F.2d 728 (9th Cir. 1992) . . . . . *passim*

Braswell v. Haywood Regional Med. Ctr., No. 06-1360,
2007 WL 1227464 (4th Cir. Apr. 26, 2007) 12

Bryan v. James E. Holmes Reg. Med. Ctr.,
33 F.3d 1318 (11th Cir. 1994) 12

Burney v. East Alabama Med. Ctr.,
939 F.Supp 1514 (M.D. Ala. 1996) 15

Darlak v. Bobear,
814 F.2d 1055 (5th Cir. 1987) 7

Egan v. Athol Memorial Hospital,
971 F.Supp 37 (D. Mass. 1997) 15

Fox v. Parma Cmty. Hosp.,
160 Ohio App. 3d 409,
2005-Ohio-1665 (App. 2005) 12

Garcia v. United States,
469 U.S. 70 (1984) 12

Gateway Cardiology, P. C. v. Wright,
204 S.W.3d 676 (Mo. App. 2006) 12

Lee v. Trinity Lutheran Hosp.,
408 F.3d 1064 (8th Cir. 2005) 12

Matthews v. Lancaster,
883 F. Supp. 1016 (E.D. Pa. 1995) 12

Meyers v. Columbia/HCA Healthcare Corp.,
341 F.3d 461 (6th Cir. 2003) 12

Northeast Georgia Radiological Assocs., P.C. v. Tidwell,
670 F.2d 507 (5th Cir. Unit B 1982) 7

Perry v. Sindermann,
408 U.S. 593 (1972) 8

Reyes v. Wilson Mem'l Hosp.,
102 F. Supp. 2d 798 (S.D. Oh. 1998) 12

Setliff v. Memorial Hosp. of Sheridan County,
850 F.2d 1384 (10th Cir. 1988) 7

Shahawy v. Harrison,
875 F.2d 1529 (11th Cir. 1989) 7

Yashon v. Hunt,
825 F.2d 1016 (6th Cir. 1987), *cert. denied*
486 U.S. 1032, 108 S. Ct. 2015,
100 L.Ed. 2d 602 (1988) 7

Statutes and Reports

42 U.S.C. § 11112(a)(1) (HCQIA) . . . . . *passim*

H.R. Rep. No. 99-903 (1986) reprinted in 1986 U.S.C.C.A.N. 6384, 1986 WL 31972 10

Articles, Books and Studies

Lawrence R. Huntoon, M.D., Ph.D., *Sham Peer Review and The Courts*, 11 JOURNAL OF AMERICAN PHYSICIANS AND SURGEONS, Spring 2006 18

Gail G. Garfinkel, *Is Peer Review Worth Saving?* 82 MEDICAL ECONOMICS, Feb. 18, 2005, *available at* 2005 WLNR 4097188 6

MEDICAL ETHICS ADVISOR, *Critics Charge Physician Peer Review Misused*, Aug. 1, 2006, *available at* 2006 WLNR 13751718 3

Bryan G. Hall, *The Healthcare Quality Improvement Act of 1986 and Physician Peer Review: Success or Failure? available at* www.usd.edu/elderlaw/student_papers_f2003/health_care_quality_improvement_act.htm 3, 7

Hospital Accreditation Standards 2007, published by the Joint Commission on Accreditation of Healthcare Organizations 6

Health Care Antitrust Update published by Fulbright & Jaworski, LLP, Aug. 2004 13

Internet

http://www.npdb-hipdb.hrsa.gov 17

http://www.npdb-hipdb.hrsa.gov/pubs/§/Fact_Sheet-General_Public.pdf 17

INTEREST OF AMICUS CURIAE[1]

The Semmelweis Society International consists of a group of concerned physicians and other professionals whose primary mission is to improve the quality of healthcare in the United States by advocating for fair peer review among medical doctors. One of the Society's objectives is to promote awareness that the system by which physicians are reviewed for the competency of their medical judgment and skill is often driven by economics and has little or nothing to do with quality of care.

The Semmelweis Society was named for Ignaz Philipp Semmelweis, a 19th century physician who practiced in a maternity hospital in Vienna, Austria. In Europe at that time, mortality rates in maternity hospitals were as high as 30 percent. A postpartum infection known as puerperal fever was the main cause of death. When Dr. Semmelweis decided to investigate the cause of puerperal fever, his superiors objected on the grounds that the high mortality rates were normal and non-preventable. After Semmelweis discovered that mortality rates were highest in the delivery room where students attended the labor of healthy mothers immediately after dissecting the bodies of women who had died of puerperal fever, he ordered all medical students to wash their hands prior to delivering babies. As a result, the mortality rate plummeted to 1 percent. Yet Semmelweis's published findings

---

[1] Pursuant to Rule 37.6 of the Supreme Court of the United States, counsel for *amicus curiae* authored this brief in whole, and no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

regarding the prevention of puerperal fever were met with antagonism in the medical community and caused him to be rejected by his peers. Sham peer review existed at that time and the reality of its existence today is what brings the Semmelweis Society to this Court.

In 1986, Congress enacted the Health Care Quality Improvement Act ("HCQIA"), the federal law that provides protection from liability to healthcare institutions and physicians involved in peer review, so long as certain conditions are met during the peer review process. The law also established the National Practitioner Data Bank ("NPDB"), to which healthcare institutions must report those peer review actions. Due to the attempt of the drafters of HCQIA to provide for immunity for the members of peer review committees, and the subsequent interpretation of that immunity by the courts, the use of bad faith or sham peer review is rampant. Paramount among those bad faith reviews are those pursued for economic competition rather than for legitimate reasons.

Among the many voices that have condemned the abuse of the system and have called for reforms, one of the most prominent is the Semmelweis Society International.

INTRODUCTION

Stories like that of Dr. Semmelweis are common. Though the phenomenon is most often visited by legal professionals, it is the norm rather than the exception that physicians who call into question the quality of care at a particular hospital, or physicians who pose an economic threat to a hospital or physician group, or cause a healthcare facility to incur higher costs in the interest of better care, find themselves at the center of proceedings that charge them with poor medical

judgment and/or disruptive behavior. Indeed, under the guise of a measure provided by law to ensure quality of care, such doctors are faced with being labeled substandard practitioners or menaces in the workplace. The results are devastating and the process is pervasive.

> "According to the Massachusetts Medical Society (MMS), it was estimated in the 1990s that one in 20 physicians will undergo an incident-based peer review process and one in five will serve on a peer review committee to evaluate an alleged quality problem."[2]

Commentators have argued that HCQIA has helped to promote a peer review process that has "minimal concern for the ultimate goal of quality health care but instead is used as an instrument for political and economic motives." [3]

There is no doubt that healthcare is on the minds of the public. It has been one of the main topics in the presidential primary debates for both parties and is the subject of Michael Moore's latest documentary. States grapple with how to provide healthcare for their poor and uninsured citizens. The federal government struggles with what to do about Medicare. At the forefront of this are the physicians who care for the public. These are the people who are affected by HCQIA. This is a statute that affects the lives of physicians - people the

---

[2] *See* MEDICAL ETHICS ADVISOR, *Critics Charge Physician Peer Review Misused*, Aug. 1, 2006, *available at* 2006 WLNR 13751718.

[3] *See* Bryan G. Hall, *The Healthcare Quality Improvement Act of 1986 and Physician Peer Review: Success or Failure? available at* www.usd.edu/elderlaw/student_papers_f2003/health_care_quality_improvement_act.htm.

public count on to heal them. Bad faith peer review also leaves the public defenseless. It is important for this Court to make certain that HCQIA is interpreted and applied as Congress intended. At present, it is not.

SUMMARY OF ARGUMENT

One of the realities of modern medicine is the necessity for a physician to maintain hospital privileges in order to have a financially successful practice. This need is so important that privileges have been held to be a fundamental vested right. In the case before this Court, Richard Cowett, M.D. was denied a fundamental property interest without regard to the motives underlying that denial. This came about because of the long-standing misinterpretation of the test in HCQIA for qualified immunity as set forth by the Court in *Austin v. McNamara*, 979 F.2d. 728 (9th Circuit 1992).

In that case, the United States Court of Appeals for the Ninth Circuit adopted the so called "objective test" and interpreted HCQIA's legislative history to mean that a physician's allegations of "animosity," "hostility" or "bad faith" were irrelevant because "the test [for immunity under 11112(a)] is an objective one." *Id.* at 734. This case has been followed by numerous state and federal courts and has been the standard for review of peer review decisions. The adoption of the objective test is not only wrong but it ignores the realities of the practice of medicine. Economic competition is widespread in hospitals throughout the United States.

In deciding that bad faith was immaterial to whether peer review meets the reasonableness standards under 42 U.S.C., section 11112(a)(1), the *Austin* Court closed the door to any possibility that the motive for the peer review might be that of

economic or political competition. However, evidence of motive is relevant to an evaluation of the reasonable belief element of HCQIA immunity.

Moreover, the existence of the National Practitioner Data Bank ("NPDB") and HCQIA's mandatory reporting requirement has real and devastating effects on a physician's livelihood. One of the purposes of HCQIA was to stem the ease with which bad physicians were able to move to different hospitals or different states and continue to practice without anyone finding out about an adverse peer review action. (42 U.S.C., section 11101(2).) The NPDB was established to remedy the situation. Following a submission of a report to the NPDB, any hospital to which the physician applies for privileges will be made aware of the report. Thus, it is easy to see how malicious peer review undertaken by an economic competitor could ruin a physician's possibility of practicing in every state.

Grant of this Petition for Certiorari is essential to make clear that evidence of motive is relevant to an evaluation of the reasonable belief element of HCQIA immunity and correct the current error in statutory interpretation which continues to allow sham peer review to exist.

ARGUMENT

I. It Is Essential That HCQIA Be Interpreted In a Manner That Fairly Effectuates Congressional Intent While Protecting The Physicians Directly Affected Thereby.

It has been written that "[H]ospital peer review is one of the most closed boxes in the healthcare system."[4] Those most affected by it are the physicians dependent on hospital privileges for their livelihood. The Joint Commission on Accreditation of Health Care Organizations ("JCAHO") has defined privileging as:

> "The process whereby a specific scope and content of patient care services (that is, clinical privileges) are authorized for a health care practitioner by a health care organization, based on evaluation of the individual's credentials and performance."[5]

One of the realities of modern medicine is the necessity for a physician to maintain hospital privileges in order to have a financially successful practice. Any restriction of a physician's hospital privileges will have a "destructive effect"

---

[4] Gail G. Garfinkel, *Is Peer Review Worth Saving?* 82 MEDICAL ECONOMICS, at 2, Feb. 18, 2005, *available at* 2005 WLNR 4097188.

[5] *Hospital Accreditation Standards 2007*, published by the Joint Commission on Accreditation of Healthcare Organizations, Glossary at p. 426.

on the physician's practice.[6] This interest is so important, that it has been held to be a fundamental vested right.

Federal courts have considered the issue of vested rights in cases involving public hospitals. In those cases, several circuits have acknowledged that in certain circumstances physician's privileges constitute a property interest whose revocation or suspension by the hospital must satisfy the requirements of due process. *See, Darlak v. Bobear,* 814 F.2d 1055 (5th Cir. 1987) ("It is well-settled in this circuit that a physician's staff privileges may constitute a property interest protected by the due process clause..."); *Yashon v. Hunt,* 825 F.2d 1016, 1022-27 (6th Cir. 1987), *cert. denied* 486 U.S. 1032, 108 S. Ct. 2015, 100 L.Ed. 2d 602 (1988) (reviewing for conformity with principles of due process public hospital's refusal to reinstate neurologist's privileges); *Setliff v. Memorial Hosp. of Sheridan County*, 850 F.2d 1384, 1394-95 (10th Cir. 1988) (while physician might have had property interest in his medical privileges, no due process violation occurred where hospital provided pre-suspension hearing); *Shahawy v. Harrison* 875 F.2d 1529, 1532-33 (11th Cir. 1989) (although physician had protected property interest in staff privileges, public hospital's termination of these privileges comported with due process).

All of these cases are premised on the assumption that when a public hospital grants a physician hospital privileges, and undertakes explicitly or implicitly not to revoke these privileges without appropriate process, a protected property interest is created. For example, in *Northeast Georgia Radiological Assocs., P.C. v. Tidwell*, 670 F.2d 507, 510-11 (5th Cir. Unit B 1982), the Fifth Circuit reviewed the

---

[6] (Hall, *supra.*)

revocation of privileges from a physician with whom a public hospital had entered into an exclusive services contract, incorporating the medical staff by-laws, and the by-laws *per se*, established 'the existence of rules or mutually explicit, understandings,' and sustained [the] claim to a protected property interest." *Id.* (citations omitted). As the basis for its decision, the *Tidwell* court relied on the Supreme Court's holding in *Perry v. Sindermann*, 408 U.S. 593, 601, 92 S.Ct. 2694, 2699, 33 L.Ed. 2d 570 (1972), that a state college teacher could have acquired a "legitimate claim of entitlement" to continued employment where state officials fostered the understanding that he would not be terminated absent proper cause. *Perry*, 408 U.S. at 602, 92 S.Ct. at 2700.

In the case before this Court, Richard Cowett, M.D. was denied a fundamental property interest without regard to the motives underlying that denial. The Semmelweis Society is concerned with all the physicians who are equally denied those rights. Dr. Cowett was hired in August of 2001 as Director of the Special Care Nursery ("SCN") at Tod Childrens Hospital in Youngstown, Ohio ("Tod"). His 30 year career was unblemished by malpractice lawsuits or peer review discipline. Unbeknownst to him, at the time he was hired, Dr. Cowett found himself in the midst of a tense relationship between Tod and University Hospitals of Cleveland, Ohio ("UH"). One of the subjects of the tension was who had control of the SCN at Tod. When Dr. Cowett arrived at Tod, Dr. Natalie Yeaney (a UH physician only weeks out of her residency) was assigned to Tod's SCN. Immediately, Dr. Yeaney challenged several of Dr. Cowett's leadership and medical decisions and presented three meritless complaints about Dr. Cowett's treatment of certain babies.

As discussed in detail in the Petition for Certiorari in this case, evidence established that the peer review process was tainted from its inception. Of primary importance was an e-mail that evidences that UH wanted to determine who would control Tod's SCN and did not want that person to be Dr. Cowett. To further verify the existence of the sham peer review, and to lawfully pacify UH, Tod could simply have advised Dr. Cowett of its dilemma, terminated his contract and collaborated with UH to name his replacement. But Tod would have owed Dr. Cowett $400,000 under his employment contract. Instead, it pursued Dr. Yeaney's false charges through the sham peer review process, enabling it to terminate Dr. Cowett's hospital privileges and therefore, not owe Dr. Cowett the money. Accordingly, within two months of arriving at Tod, Dr. Cowett was terminated and a report was filed with the National Practitioner Data Bank.

After ultimately entering summary judgment on Defendant/Appellee's claim of HCQIA immunity, Petitioner appealed his case to Ohio's 7th District Court of Appeal which affirmed the trial court's ruling. The appellate court refused to consider Petitioner's evidence that its discipline was motivated by the hospital's profit interest and was not "in the reasonable belief that the action was in the furtherance of quality healthcare." The Court's decision was based upon the long-standing judicial interpretation of HCQIA inconsistent with the intent of the act.[7]

The Semmelweis Society asks this Court to examine the improper judicial expansion of the immunities provided by

---

[7] On February 28, 2007, Ohio's Supreme Court, by a 5-2 vote, declined to accept jurisdiction to hear the case.

HCQIA and stem the tide of abusive and anti-competitive peer review.

II. As Interpreted By the Courts, the Health Care Quality Improvement Act Protects Peer Review Committee Members That Use The Peer Review Process to Rid Themselves Of Economic Competitors.

It is time to look at the reality of where HCQIA stands almost twenty-one years after its was enacted. HCQIA is one of the most critical statutes for the healthcare system, but has never been reviewed by this Court. It is critical to insure the maintenance of the highest standards of medical care in this country through effective peer review.

In interpreting the statute, both federal and state courts have gone far afield of what Congress intended by its enactment. The House Report on the bill clearly recognized the importance of protecting the target of a peer review proceeding from anticompetitive behavior: "[T]he bill protects innocent and often helpless consumers from abuses by bad doctors without insulating improper anticompetitive behavior from redress."[8]

In order to satisfy its goals of addressing the quality of care issues while providing immunity from subsequent lawsuits by disciplined physicians and not serving as a shield for anticompetitive behavior, the statutory immunity was enacted. To qualify for HCQIA immunity, peer view actions must be taken:

---

[8] H.R. REP. NO. 99-903 (1986) reprinted in 1986 U.S.C.C.A.N. 6384, 1986 WL 31972 (emphasis supplied)

(1) in the reasonable belief that the action was in the furtherance of quality health care;

(2) after a reasonable effort to obtain the facts of the matter;

(3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances; and

(4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

42 U.S.C. § 11112(a)(1)-(4).

A hospital must have complied with all four standards to be protected by HCQIA's qualified immunity. The statute presumes that a challenged peer review action was reasonable. But a physician can rebut the presumption "by a preponderance of the evidence." 42 U.S.C. §11112.

It is important, as well, to remember that HCQIA merely created a "presumption of immunity." As the Act clearly states:

> "A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence." *Id.*

While the Committee adopted a "reasonable belief" standard instead of a "good faith" standard, at no time did the

committee state that motive was irrelevant in evaluating reasonableness. However, that consideration has been judicially eliminated and the result has been to insulate anti-competitive activity in direct contravention of the purpose of the Act.

Almost fifteen years ago, the United States Court of Appeals for the Ninth Circuit, in *Austin v. McNamara*, 979 F.2d 728 (9th Cir. 1992) adopted the so-called "objective test" and interpreted HCQIA's legislative history to mean that a physician's allegations of "animosity," "hostility," or "bad faith," were irrelevant because "the test [for immunity under §11112(a)] is an objective one." *Id.* at 734. Followed by numerous state and federal courts this decision has been the standard for review of peer review decisions.[9] The adoption of the "objective test" is not only wrong, but it ignores the realities of the practice of medicine. Whether in big cities or small towns, economic competition is rampant. And peer review is being used as a tool to thwart that competition.

In deciding that bad faith is immaterial to whether peer review meets the reasonableness standards under 42 U.S.C.

---

[9] *Austin v. McNamara*, 979 F.2d 728 (9th Cir. 1992) 13, 14; *Braswell v. Haywood Regional Med. Ctr.*, No. 06-1360, 2007 WL 1227464 (4th Cir. Apr. 26, 2007); *Bryan v. James E. Holmes Reg. Med. Ctr.*, 33 F.3d 1318 (11th Cir. 1994); *Fox v. Parma Cmty. Hosp.*, 160 Ohio App. 3d 409, 2005-Ohio-1665 (App. 2005); *Garcia v. United States*, 469 U.S. 70 (1984); *Gateway Cardiology, P. C. v. Wright*, 204 S.W.3d 676 (Mo. App. 2006); *Lee v. Trinity Lutheran Hosp.*, 408 F.3d 1064 (8th Cir. 2005); *Matthews v. Lancaster*, 883 F. Supp. 1016 (E.D. Pa. 1995); *Meyers v. Columbia/HCA Healthcare Corp.*, 341 F.3d 461 (6th Cir. 2003); *Reyes v. Wilson Memorial Hospital*, 102 F. Supp. 2d 798 (S.D. Ohio 1998)

§11112(a)(1), the *Austin* court closed the door to any possibility that the motive for the peer review might be that of economic or political competition. More importantly, it has apparently foreclosed any consideration of that by the courts.[10] It was up to the dissent in *Austin* to point to the fallacy of the reasoning:

> Evidence of motive and intent is relevant to show whether defendants possessed a reasonable belief that the final revocation was warranted by the facts known.
>
> Moreover, the legislative history discussing the due process requirements of section 11112 makes clear that it is essential that "physicians receive fair and unbiased review to protect their reputation and medical practice." 1986 Code Cong. & Admin. News at 6393. Any inquiry into the reasonableness of the reviewers' beliefs should at least consider any evidence of bias or ulterior motive even though an objective standard ultimately applies. (*Id.* at 741, fn.3; citations in original)

The failure of subsequent courts to give credence to the reasoning of the dissent in *Austin* has served to further erode the confidence in the peer review system:

---

[10] There is little incentive for a physician to proceed with any form of action. In the years following the passage of HCQIA, which created the antitrust safe harbor for peer review decisions, "...the number of physician privilege antitrust cases dropped by approximately 10%" (*see Health Care Antitrust Update* published by Fulbright & Jaworski, LLP, August 2004).

> "But what we've seen occur since HCQIA was enacted is basically a clear distortion of peer review from being a process that should be aimed at quality improvement to a process that is a punitive mechanism where immunity provisions of HCQIA can be used as a sword to dismiss physicians for reasons having nothing to do with health care quality." (*Id.* at fn 1).

The very purpose for the legislation, "to improve the quality of medical care by encouraging physicians to identify and discipline other physicians who are incompetent or who engage in unprofessional behavior" (*Id.* at fn 6), is being diminished.

Contrary to the *Austin* court, a consideration of the bias or ulterior motive of the members of a peer review panel is not incompatible with the use of an "objective test." It is uncontroverted that, if a peer review is conducted pursuant to section 11112(a) it qualifies for immunity from monetary damages. Of course, the presumption can be rebutted by a preponderance of the evidence. However, this is an empty remedy if evidence of motive cannot be introduced.

Austin derives its "objective test" from a distinct piece of legislative history that it quotes as follows:

> "The Committee intends that *this test will be satisfied if the reviewers,* with the information available to them at the time of the professional review action *would reasonably have concluded that their actions would restrict incompetent behavior or would protect patients."* (*Id.* at p. 734; emphasis in original; citing H.R. rep. No. 903, 99th Cong., 2d Sess. 10, *reprinted in* 1986 Code Cong. & Admin. News 6392-93)

Amicus submits that allowing evidence of bias or economic competition so as to rebut the presumption of "reasonableness" will not vitiate the "objective test." It would, however, require the decision-maker to inquire whether there was bias, economic competition, or any other motive deemed to be unfair in determining the very reasonableness of the actions. The two inquiries cannot only stand together - they must in order to insure a fair and unbiased peer review. While not ultimately departing from the *Austin* analysis, the Court in *Burney v. East Alabama Medical Center,* 939 F.Supp 1514, 1526 (M.D. Ala. 1996), acknowledged that the investigation should also be "fair."

Balanced against this simple solution to the problem is the lack of prejudice it will cause. It is, on balance, a simple inquiry. This was acknowledged by the court in *Egan v. Athol Memorial Hospital,* 971 F.Supp 37 (D. Mass. 1997):

> "Had the reviewing committee consciously joined with members of the hospital staff to manufacture or exaggerate incidents or had anyone been economically motivated to conspire to restrain plaintiff's practice, defendants would be unreasonable to believe their conduct constitute a legitimate peer review. *Id.* at 44; citations omitted.

There is, of course, no guarantee that the mere existence of bias or economic competitiveness on the part of a member of the peer review panel will serve to overcome the presumption of reasonableness, but the interests of justice will be served by a fair and complete inquiry.

What the Semmelweis Society is asking this court to do by granting this Petition for Certiorari is to finally address the proper legal standard for review of a peer review decision.

Considering the fact that the legislative history cited clearly evidences a consideration of, and concern with bias and anti-competitiveness, it is difficult to envision a legal system that totally ignores consideration of those very issues. Especially when a physician's livelihood is at stake.

This is a case concerned with the fundamental fairness of the legal system and the most basic of the due process rights to be afforded a plaintiff. This due process consideration is at the very heart of what the parties seek from this Court of ultimate authority.

III. The Existence of the National Practitioner Data Bank and HCQIA's Mandatory Reporting Requirement Has Real and Devastating Effects On A Physician's Livelihood.

Aside from using sham peer review to deprive a physician of a vested property interest, the reporting requirements of HCQIA have a devastating effect on a physician's livelihood. One of the expressed needs for the legislation was to stem the ease in which bad physicians were able to move to different hospitals or different states and continue their practice without anyone finding out about an adverse peer review action. *(Id.* at fn. 6 *see also* 42 U.S.C. sec. 11101 (2)).

To remedy this situation, HCQIA established the National Practitioner Data Bank, a mandatory system for reporting physicians where a professional review action had adversely affected their clinical privileges for a period greater than 30 days. A hospital faces sanctions for failure to report as

required.[11] From the point the physician is reported, any time he applies for licensure or a new job, a mandated search of the NPDB will reveal the action taken. That can destroy a physician's career. (*Id.* at fn 1). The name of the physician entered into the databank will stay there unless the person or institution that lodged the original complaint requests the physician's name be removed. (*see* http://www.npdb-hipdb.hrsa.gov/).

Following the submission of a report, any hospital to which the physician attempts to gain privileges will have access to the NPDB and will be made aware of the report. In effect, the physician will essentially be "blacklisted." (*id.* at fn 2.) Even the NPDB website designates it as a "...flagging system designed to facilitate a comprehensive review of health care practitioners' professional credentials." (*id.* at fn 10.) It holds itself out as a:

> "...resource to assist State licensing boards, hospitals, and other health care entities in conducting investigations of the qualifications of the health care practitioners they seek to license or hire, or to whom they wish to grant membership or clinical privileges." (http://www.npdb-hipdb.hrsa.gov/pubs/fs/Fact_Sheet-General_Public.pdf)

---

[11] "...the name of the entity will be published in the *Federal Register*, and the entity will lose the immunity provisions of Title IV with respect to professional review activities for a period of 3 years, commencing 30 days from the date of publication in the *Federal Register.*" *See* (http://www.npdb-hipdb.hrsa.gov/pubs/fs/Fact_Sheet-General_Public.pdf)

While Amicus does not dispute the need for and the benefit of the NPDB, it is perhaps this reporting requirement that most necessitates this Court's consideration of this matter. It has been argued that:

> "With the implementation of HCQIA's National Practitioner Databank (NPDB), ... a successful sham peer review attack by a hospital often results in a professional death sentence for the targeted physician."[12]

If, just because the peer review body complied with the standards set forth in 42 U.S.C. section 11112 (a), the courts are allowed to use a strictly objective standard with no regard to underlying motive whatsoever, it is easy to see how a peer review undertaken by economic competitors could ruin a physician's career. That could not have been the intent of Congress in enacting HCQIA, especially considering the alternative - a simple inquiry into the motives behind the peer review action.

CONCLUSION

This Court should grant the Petition for *Writ of Certiorari*.

The Semmelweis Society International urges this Court to grant the Petition for Writ of Certiorari filed in this matter. It is imperative that this Court review this important federal statute and give proper effect to the intent of Congress.

---

[12] Lawrence R. Huntoon, M.D., Ph.D., *Sham Peer Review and The Courts*, 11 JOURNAL OF AMERICAN PHYSICIANS AND SURGEONS, at p. 4, Spring 2006.

Respectfully submitted,

TOM CURTIS*
Counsel of Record
ABBIE P. MALINIAK
CURTIS GREEN & FURMAN LLP
140 SOUTH LAKE AVENUE
SUITE 208
PASADENA, CA 91101
(626) 585-9800

**Counsel For Amicus Curiae*

Dated: July 2, 2007